IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners,*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES, *Petitioner,*

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Petitioner,*

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS IN NO. 750

ARGUMENT

Both the FEC's and the Association of American Railroads' principal argument is that the Railway Labor Act cannot be literally enforced against a car-

rier during a legal strike because this results in an unfair advantage to the striking unions for the reason that operation of a railroad in compliance with "the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements" will *always* mean that any operation at all is impossible.

The premise of this argument is that no collective bargaining agreement can ever be complied with under strike conditions. The Court of Appeals accepted this premise in the *Trainmen* decision as the basis for creating the doctrine of "reasonably necessary" exceptions, saying (336 F. 2d at 181):

> "Anything less either temporizes with the so-far-determined policy against compulsory arbitration, or puts the full weight of law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions *imposed* by the organized employees who now refuse to perform as agreed." (Emphasis added.)

Petitioners respectfully submit that the premise underlying this principal argument is false, and that the notion of a collective bargaining contract *imposing* conditions by one party on the other must spring from a basic misconception of the role and function of collective bargaining.

What goes into a collective bargaining contract is obviously no more *imposed* on the railroad by the organized employees than it is *imposed* on the employees by the railroad. A collective bargaining contract is, as the statute refers to it, an "agreement". It is the product of negotiation, of the give and take of collective bargaining. What results is probably not totally satisfactory to either party, but is agreed to by

both parties as the best compromise attainable under all of the circumstances then existing and therefore as being in each one's own selfish best interests.

With this in mind, it is clear that a labor agreement can easily be drawn which would impose virtually no hardship on a carrier under strike conditions. By the same token, one could be as easily drafted that would, in truth and fact, make operations under strike conditions impossible under any conceivable situation.

Whether a particular contract is more like the first than the latter category will depend and vary according to the particular factors involved in the negotiation of each individual agreement.

A lengthy brief could be written in this case closely analyzing and construing each of the eleven collective bargaining contracts here involved and showing that none of such contracts actually precludes operations by the FEC under existing strike conditions. This is not necessary, however, since the FEC itself conceded at the trial that full compliance at that time would not shut down the railroad, but only reduce its operations by from 30% to 50% (R. 196, 206, 214, 219, 330, 381, 354, 367, 771, 863).

In the *Trainmen* case counsel for the union attempted at oral argument before the Court of Appeals to demonstrate that full compliance with the *Trainmen's* contract was also not impossible for the FEC. There is no flat prohibition in the *Trainmen's* contract against using supervisors, but that contract does prohibit such use of supervisors where scope employees are ready and willing to perform the work. Thus, the railroad has been required to pay scope employees who wanted

to work but were deprived of work by the railroad's use of supervisors. Similarly, the *Trainmen's* contract could have, but did not flatly prohibit operating train crews through terminals. But the contract did require that when this was done, the railroad had to pay the crew doing double duty double wages, and also, if another crew, with first priority to the work, was thereby wrongfully deprived of a chance to work, the railroad would have to pay that other crew its lost wages too. Counsel also pointed out that the Union Shop clause obviously did not (and could not under Section 2, Eleventh, of the Act) prohibit hiring non-union employees or require that they be discharged except for failure "to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

The Court of Appeals took these arguments as "concessions" that the contracts need not be complied with under strike conditions (336 F. 2d at 181) as does the FEC in its initial brief to the Court in this case (Brief for Petitioner in No. 783, p. 32). This is not so. Such arguments are not "concessions" in any sense of the word, but merely illustrations of the fact that compliance with collective bargaining contracts by a struck railroad is not necessarily an impossibility but may be only an economic burden. How heavy a burden, and how close the burden comes to practical impossibility, depends upon how successfully the railroad emerged from its last contract negotiations. But to relieve a struck railroad from this economic burden, in whole or in part, by judicial decree is to take from the unions and striking employees an economic advantage already gained by them at the bargaining table by negotiation

with the railroad, perhaps at the cost of great concessions made and already given on their part.

The fact that contracts are and can be drawn with the idea of strike conditions in mind is clearly illustrated by the contracts in this case. The provision of Rule 16 of the Machinists', etc., contract as quoted at p. 47 of the Government's initial brief, and as it appears in the record at Exh. Vol., p. 255, illustrates this clearly. The carrier there proposed that special rules should become operative "in the event of a strike or emergency affecting the operations or business of the Carrier * * * " (Exh. Vol., p. 255). Through negotiations at the bargaining table the carrier substantially obtained its wishes in this regard (Exh. Vol., p. 255). No doubt the unions conceded on that point in return for some comparable concession in another part of the contract made by the carriers. For a court to then by decree make further concessions favorable to the carrier without any consideration to the union is to frustrate and undercut collective bargaining in the most fundamental way.

Indeed, the very fact that the carriers in national conference made the proposal set forth at Exh. Vol., p. 255, for special rules to govern strike operations (a proposal made prior to August 21, 1954; Exh. Vol., p. 239) is the most persuasive proof possible that the understanding of the railroad industry throughout the years of the Railway Labor Act's application is that contract rules, rates of pay and working conditions must be complied with under strike conditions. Otherwise, why propose and negotiate for special contract rules to cover such a situation The current contentions of the FEC and the Association of American Railroads that everybody concerned has always be-

lieved and understood that all contracts are suspended during the period of a strike, and a carrier may then operate under any rules it deems necessary, are expediently and flatly inconsistent with "Carriers' Proposal No. 11" made long before this litigation arose and set forth in Defendant's Exhibit No. OO (Exh. Vol., pp. 255, 238-261; R. 894):

> "Article VI—Carriers' Proposal No. 11
>
> "Establish a rule or amend existing rules to provide that in the event of a strike or emergency affecting the operations or business of the Carrier, no advance notice shall be necessary to abolish positions or make force reductions."

This proposal was made in the decade of the 1950's by all of the Class I American railroads represented by the Eastern, Western and Southeastern Carriers' Conference Committees to fifteen railway labor organizations, including the eleven union petitioners in this case (Exh. Vol., pp. 239, 259-261). Obviously, the carriers' representatives who made such a proposal at that time were strangely unaware of what the Association of American Railroads describes in its *amicus curiae* brief (pp. 21-22) as a practice so universally known and accepted in the industry that it has never been questioned before.

Petitioners suggest that the "reason why no court has ever ruled on the question raised here" (AAR brief, p. 21) and the reason why the suits the Government instituted in this dispute against the FEC are the first actions, either civil or criminal, brought by the United States under the Railway Labor Act (Government brief, p. 54), is that no carrier before has ever embarked upon such a bold and flagrant course of action

in the face of the heavy criminal penalties so dramatically computed by the AAR in its brief (pp. 42-44) and understandably not referred to in the FEC brief. This Court should not now sanction such a new and radical departure from the clear provisions of the Railway Labor Act.

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Certificate of Service

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